

25 September 2013

Via E-Mail

Joseph L. Andrus
Head of Transfer Pricing Unit
OECD Centre for Tax Policy and Administration
2, rue André Pascal
75775 Paris Cedex 16
France

Comments by SwissHoldings on the Revised Discussion Draft On Transfer Pricing Aspects Of Intangibles”, released by the OECD on 30 July 2013

Dear Mr. Andrus

The business federation SwissHoldings represents the interests of 57 Swiss based multinational enterprises from the manufacturing and service sectors (excluding the financial sector). SwissHoldings is pleased to provide comments on the OECD Revised Discussion Draft on Transfer Pricing Aspects of Intangibles (hereafter referred to as “the Draft”).

General comments

SwissHoldings welcomes the efforts made by the OECD to provide more specific guidelines on transfer pricing aspects of intangibles. We believe that a common basis for addressing the topic will support the international trade and enhance growth. SwissHoldings is appreciative of the fact that the Draft contains a number of improvements compared to its first version. Since we are still concerned about some aspects of the Draft we would like to seize the opportunity to address these hereinafter. Our specific comments follow the structure of the Draft.

I. PROPOSED AMENDMENTS TO CHAPTERS I – III OF THE TRANSFER PRICING GUIDELINES

[Paragraph 17]: the Draft seems to suggest that there can be situations when a temporary relocation of a single individual will give rise to a transfer of a valuable intangible (i.e., know-how). We believe that the knowledge and experience of employees is not owned by the employer. It is also not fully under the control of the company. As rightly pointed out, the knowledge and experience of an employee can constitute a comparability factor that requires a certain level of compensation. We believe, however, that temporary transfers of individuals (and even more of a single individual) do not give rise to a transfer of intangibles.

II. CHAPTER VI SPECIAL CONSIDERATIONS FOR INTANGIBLES

Section A

The Draft does not separately address the issue of customer base, in particular the value that can (or cannot) be attributed to an (group) internal customer base, i.e., customers that belong to

the same group as the supplier. SwissHoldings believes that such guidance would enhance the clarity of the topic.

[Paragraph 44]: The Draft rightly points out that some intangibles are “non-unique” or routine and as such they do not give right to additional compensation. The text seems to suggest, however, that such intangibles are very rare. SwissHoldings believes that in business reality in many industries such non-unique intangibles occur often. Therefore, we suggest to revise the wording accordingly to make it clear that non-unique intangibles should not be perceived as highly unusual items.

Section B

[Paragraph 80]: For larger MNEs it is challenging that all more important functions are performed by own employees of a single entity. Employees responsible for intangibles may be located in various countries for different reasons. Positions and roles of employees may change frequently without relocation. Therefore, connecting the intangible related return to where employees are physically located may lead to the wrong results. It should be allowed that at least to some extent certain functions (even if they are deemed important) are outsourced or purchased in via service agreements, without applying the profit split method.

[Paragraph 87]: The Draft suggests that the owner of the intangibles related to the manufacturing process bears the product liability risk. Typically, in most value chains, it is assumed that the product liability risk rests with the manufacturer, unless product liability is caused by, e.g., wrongly developed intangibles.

[Paragraph 89]: We propose to replace the wording “The legal owner of an intangible ...” by “A group entity (including the legal owner of an intangible) ...”.

Section D

[Paragraph 99]: Paragraph 99 makes reference to paragraph 7.13 suggesting that group names and trade names are only an indication of membership in a particular MNE and as such can be considered as passive association to the Group only, not giving right to additional compensation. SwissHoldings wishes to underline that most of the MNEs have large corporate marketing departments that actively promote the group names and trade names in order to create positive perception of these in the public domain. Therefore, the group names and trade names cannot be considered as pure signs of passive association with a given Group.

[Paragraph 139]: Business practice shows that few, if any, intangibles have an indefinite useful lifetime. In our view the Draft should clearly state that such intangibles occur only in exceptional cases.

[Paragraph 160]: The use of the cost based methods is still strongly discouraged in the Draft. In practice, cost based methods may be a useful tool in certain circumstances also for business related intangibles (not only internal software). Sometimes it is the only possible method to apply due to the lack of other financial data. SwissHoldings believes that the language of the Draft should be softened to acknowledge that the cost base methods, when used with diligence, can in some situations provide valuable insights into the arm’s length value of certain intangibles.

[Paragraph 173]: The wording about the use of PPA valuations does not fully match the wording included, e.g., in paragraph 62 where it is mentioned that PPA valuations may provide a useful starting point for a transfer pricing analysis. Also Example 16 makes reference to a valuation

performed for accounting purposes and uses this to justify the arm's length compensation. SwissHoldings believes that indeed PPA valuations are a valuable indication that can reasonably contribute to the evaluation of the intangibles from a tax point of view.

[Paragraph 196]: The Draft leaves open whether a valuation needs to be done on a pre-tax or an after-tax basis. Does it mean that the taxpayer has a choice between after-tax and pre-tax analysis? Transfer pricing analyses are usually done before tax.

Examples

[Example 17]

SwissHoldings believes that this example can be deleted. It covers a very specific case, and the facts are not described in a sufficiently detailed manner to draw precise and firm conclusions.

[Example 22]

The conclusion in paragraph 307 is not entirely clear. In particular, it is not clear what "inadequate" means – too high or too low. Reference to Chapter IX could be included which specifically addresses the centralization of intangibles.

[Example 23]

The example refers again to valuations made for accounting purposes. Albeit we agree with the overall conclusion of the example, we believe that from practical perspective valuations made on aggregated level may create accounting and tax issues in the receiving company.

[Example 24]

Disclaimer in paragraph 320 should be moved to the beginning of the Example. Example 24 may create an invitation to an oversimplified and formulaic approach towards valuations of intangibles. As a result, both taxpayers and tax administrations could limit their analysis to assessing the "residual value" of a business after subtracting some routine items. This is in contradiction with current wording of paragraph 151. Example 24 raises several questions that would need to be further addressed and which go beyond the content of the current Draft, such as

- The profit level to be used: Operating Margin (before taxes) or Net Profit (after tax);
- Tax rate to be used;
- The taxes that Pervichnyi will pay once it sells the intangible;
- Rate of return that a third party would require to make the investment.

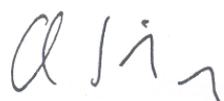
SwissHoldings therefore recommends to delete or to significantly adjust this example.

We kindly ask you to consider the above requests.

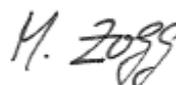
Yours sincerely

SwissHoldings

Federation of Industrial and Service Groups in Switzerland



Christian Stiefel
Chair Executive Committee



Dr. Martin Zogg
Member Executive Committee

cc: - SwissHoldings Board
- Nicole Primmer, Senior Policy Manager, BIAC
- Krister Andersson, Chariman, BusinessEurope Tax Policy Group
